No. [redacted] 21

In the Supreme Court of the United States

OCTOBER TERM, 1943

CAROLENE PRODUCTS COMPANY, A CORPORATION, CHARLES HAUSER, AND WILLIAM H. HARTKE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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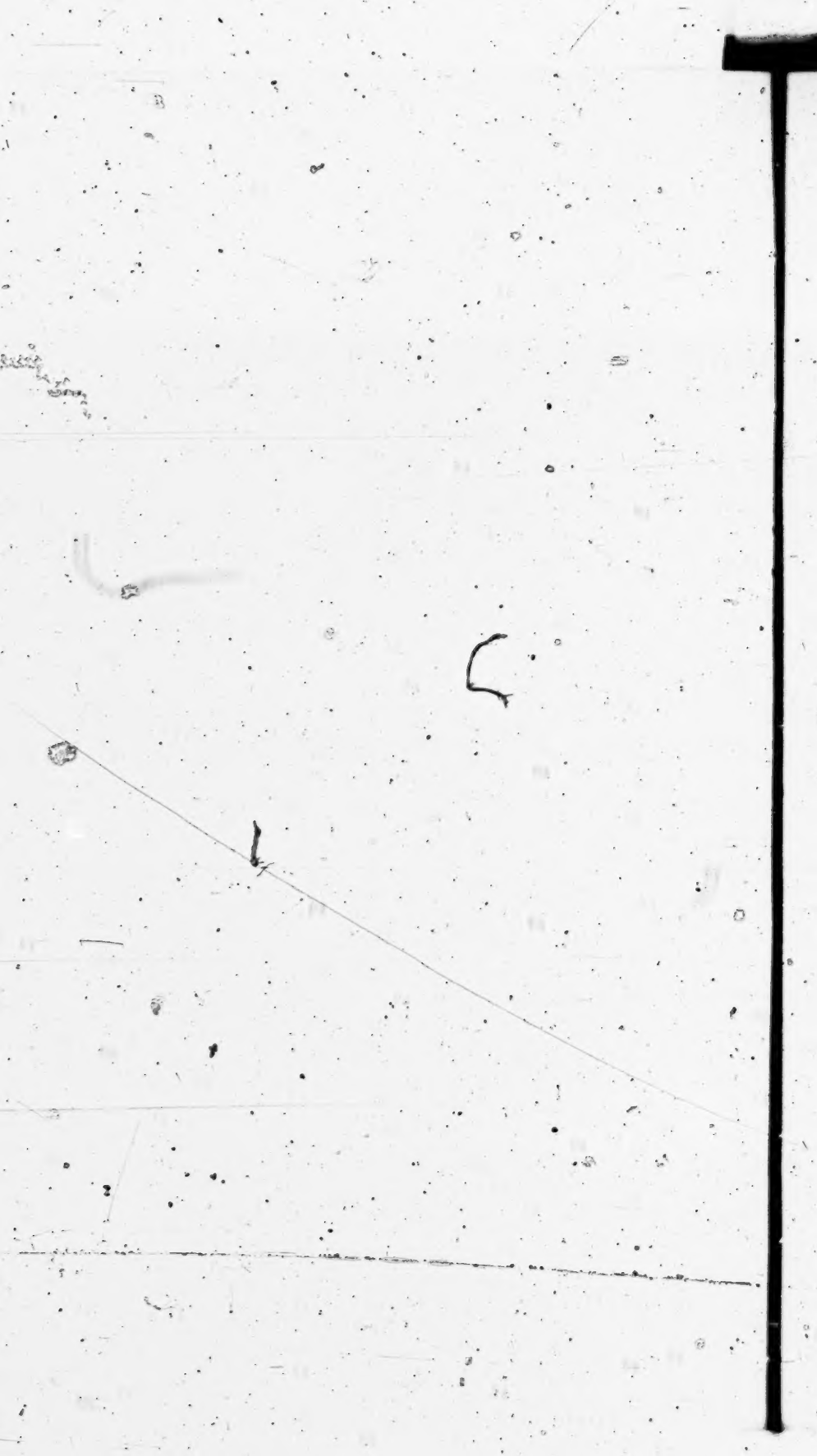

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No. 674

CAROLENE PRODUCTS COMPANY, A CORPORATION, CHARLES HAUSER, AND WILLIAM H. HARTKE, PETITIONERS

v.

UNITED STATES OF AMERICA

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OPINIONS BELOW

The opinion of the circuit court of appeals (R.[1] 285–295) is not yet reported. The opinion of the district court (R. 36–51) is reported at 51 F. Supp. 675.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 10, 1944 (R. 295). The petition for a writ of certiorari was filed on Feb-

[1] The Appendix to petitioners' Brief in the court below constitutes the Record in this proceeding, and is designated "R."

ruary 7, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the petitioners' product is "filled milk" within the meaning of the Filled Milk Act (Act of Mar. 4, 1923, c. 262, 42 Stat. 1486; 21 U. S. C. 61–64), and is therefore banned from shipment in interstate commerce.

2. Whether the Act, as applied to the petitioners' product, violates their rights under the due process clause of the Fifth Amendment.

3. Whether the trial court erred in excluding evidence offered by the petitioners to show that their product is a wholesome, nutritive, and properly labeled food.

4. Whether the evidence was sufficient to sustain the conviction of the individual petitioners.

5. Whether the trial court erred in refusing to direct a verdict for the individual petitioners because they had been called as witnesses by the Government.

STATUTE INVOLVED

Sections 1, 2, and 3 of the so-called Filled Milk Act (Act of Mar. 4, 1923, c. 262, 42 Stat. 1486–1487; 21 U. S. C. 61, 62, 63) provide as follows:

SEC. 1. (a) The term "person" includes an individual, partnership, corporation, or association;

* * * * *

(c) The term "filled milk" means any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated. This definition shall not include any distinctive proprietary food compound not readily mistaken in taste for milk or cream or for evaporated, condensed, or powdered milk, or cream: *Provided,* That such compound (1) is prepared and designed for feeding infants and young children and customarily used on the order of a physician; (2) is packed in individual cans containing not more than sixteen and one-half ounces and bearing a label in bold type that the content is to be used only for said purpose; (3) is shipped in interstate or foreign commerce exclusively to physicians, wholesale and retail druggists, orphan asylums, child-welfare associations, hospitals, and similar institutions and generally disposed of by them.

SEC. 2. It is hereby declared that filled milk, as herein defined, is an adulterated

article of food, injurious to the public health, and its sale constitutes a fraud upon the public. It shall be unlawful for any person to manufacture within any Territory or possession, or within the District of Columbia, or to ship or deliver for shipment in interstate or foreign commerce, any filled milk.

SEC. 3. Any person violating any provision of this Act shall upon conviction thereof be subject to a fine of not more than $1,000 or imprisonment of not more than one year, or both; * * * When construing and enforcing the provisions of this Act, the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such individual, partnership, corporation, or association, as well as of such person.

STATEMENT

On October 21, 1942, petitioners were indicted, in the District Court of the United States for the Northern District of West Virginia, on eight counts each charging an interstate shipment of "filled milk" in violation of the Filled Milk Act (*supra*, pp. 2–4) (R. 1–11). The products shipped were known as "Milnut," "Milnot," and "Carolene." For purposes of this case, these

products are essentially similar (Pet. 2);[2] consequently, they are referred to herein as "Carolene".

Most of the facts were stipulated (R. 31–35, 62–63, 65, 94–95, 99, 100–101, 125–126), and such proof as the Government introduced was not disputed. Carolene is manufactured as follows: The butter-fat is removed from the whole milk and sold as cream or churned into butter (R. 70). To the residual skimmed milk a vegetable oil amounting to six percent of the finished product, and fish liver oils containing vitamins A and D, are added. The compound is then evaporated to approximately one-half its original volume; and the mixture is homogenized, sealed in 14½-ounce containers, and sterilized. (R. 70–72, 124, 218–226.) The product so prepared is virtually indistinguishable from evaporated whole milk in taste, color, odor, appearance, and consistency, and is packaged in cans of the same size and style as those in which evaporated milk is customarily packaged (R. 31–35, 95, 100, 101). Carolene is manufactured by the Litchfield Creamery Company, of which petitioner Carolene Products Company is the sales agent for filled milk products (R. 96, 238). The shipments charged in the indictment were made by petitioner Carolene Products Company from Warsaw, Indiana, into the Northern District of West Virginia, where in-

[2] They are in fact identical products except for trade names (R. 25, 89).

spectors of the Food and Drug Administration secured samples of each shipment of which analyses were made. Petitioners Hauser and Hartke were, respectively, at the time of these shipments, the president and vice-president of Carolene Products Company, and both were directors and active in its management. (R. 24–25, 65, 77, 87, 88, 93, 107–108, 112–113, 116, 216.)

The only defense offered by the corporate petitioner was that the Filled Milk Act is inapplicable to Carolene for the reason that, since 1937, the product has been artificially fortified with the essential vitamins lost when the butterfat is removed from the whole milk, and is now a wholesome, nutritive, and fairly labeled article of food. The trial court rejected this proffered evidence as immaterial. (R. 136.) The additional defenses of the individual defendants, and the facts concerning them, are set forth *infra* (pp. 14–19).

A jury was waived (see R. 52), and each petitioner was found guilty by the trial court on all counts (R. 52–53). The corporate petitioner was sentenced to fines totalling $8,000 (R. 54); and the individual petitioners were each sentenced to fines totalling $8,000 and to imprisonment totalling one year, and to probation for a period of two years commencing upon the expiration of their prison sentences (R. 56–60). Upon appeal to the Circuit Court of Appeals for the Fourth

Circuit, the judgments of conviction were unanimously affirmed (R. 285–295).

ARGUMENT

I

The petitioners contend (Pet. 11–27) that the process of adding vitamins to filled milk was unknown in 1923 when Congress enacted the Filled Milk Act; that, as thus fortified, filled milk is at least as high in vitamin content as whole milk; that the characteristics of their product are the natural result of the ingredients and process of manufacture used and not in "imitation or semblance" of milk; that the Act should therefore be construed not to apply to Carolene; and that if the Act is so applied, it is invalid under the Fifth Amendment.

The Act defines "filled milk" as "any milk, cream, or skimmed milk * * * to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or dessicated" (*supra*, p. 3). This language is unambiguous, and the undisputed evidence shows that Carolene clearly falls within it. It is conceded that Carolene is skimmed milk to which is added, or which is blended or compounded with, a fat or oil other

than milk-fat (namely, cottonseed or coconut oil), and that the mixture is evaporated and homogenized so that the product is virtually indistinguishable from evaporated whole milk in taste, color, odor, appearance, and consistency (R. 101).

The petitioners contend that, notwithstanding the unequivocal language of the Act, it should not be construed to apply to their product. We submit, however, that the legislative history of the Act affords no basis for reading such an exception into its unqualified terms. Congress was unaware, of course, that vitamins lost through removal of the butter-fat from milk might conceivably be artificially replaced. Thus, the report of the House Committee on Agriculture (H. Rep. 355, 67th Cong., 1st Sess., p. 3) characterized filled milk as "a decidedly inferior product," and the Act itself (sec. 2) declared that filled milk was "an adulterated article of food, injurious to the public health * * *." But the purpose of the legislation, as disclosed by the relevant legislative materials, was broader than merely that of closing the channels of interstate commerce to a product whose use might have injurious effects upon health. The committee reports (H. Rep. 355, 67th Cong., 1st Sess.; S. Rep. 987, 67th Cong., 4th Sess.) were summarized by this Court in *United States* v. *Carolene Products Co.*, 304 U. S. 144; 149, n. 2, as follows:

There is an extensive commerce in milk compounds made of condensed milk from which the butter fat has been extracted and an equivalent amount of vegetable oil, usually coconut oil, substituted. These compounds resemble milk in taste and appearance and are distributed in packages resembling those in which pure condensed milk is distributed. By reason of the extraction of the natural milk fat the compounded product can be manufactured and sold at a lower cost than pure milk. Butter fat, which constitutes an important part of the food value of pure milk, is rich in vitamins, food elements which are essential to proper nutrition and are wanting in vegetable oils. The use of filled milk as a dietary substitute for pure milk results, especially in the case of children, in undernourishment, and induces diseases which attend malnutrition. Despite compliance with the branding and labeling requirements of the Pure Food and Drugs Act, there is widespread use of filled milk as a food substitute for pure milk. This is aided by their identical taste and appearance, by the similarity of the containers in which they are sold, by the practice of dealers in offering the inferior product to customers as being as good as or better than pure condensed milk sold at a higher price, by customers' ignorance of the respective food values of the two products, and in many sections of the

> country by their inability to read the labels placed on the containers. Large amounts of filled milk, much of it shipped and sold in bulk, are purchased by hotels and boarding houses, and by manufacturers of food products, such as ice cream, to whose customers labeling restrictions afford no protection.

It is evident that the legislation was also designed to protect farm and dairy interests from what Congress regarded as the unfair competition of a product whose inherent similarity to milk and comparatively low cost inevitably tended to engender deception in its distribution. In sustaining the constitutionality of the Act on its face, this Court recognized that the similarity of the product to milk "facilitates fraud on the public" by "making fraudulent distribution easy and protection of the consumer difficult" (304 U. S. at 149, 150). And in *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218, 229, the Court stated: "In *United States* v. *Carolene Products Co.*, 304 U. S. 144, 149, 150, we upheld the constitutionality of a statute prohibiting the sale of 'filled milk'—a condensed milk product from which the vitamin content had been extracted—although honestly labeled and not in itself deleterious". The Court further emphasized the "recognition by Congress of the inability of consumers in some cases to determine, solely on the basis of informative labeling, the relative

merits of a variety of products superficially resembling each other," and that a prohibition directed solely to false and misleading labeling is "inadequate to protect the consumer from 'economic adulteration,' by which less expensive ingredients were substituted, or the proportion of more expensive ingredients diminished" (318 U. S. at 230–231).

In upholding the constitutionality of an Ohio statute which, as construed by the state court, forbade the sale of condensed skimmed milk, Mr. Justice Holmes, speaking for the Court, said: "We may assume that the product is improved by the addition [of coconut oil], but the body of it still is condensed skimmed milk, and this improvement consists merely in making the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute. It is true that so far as the question of fraud is concerned the label on the plaintiffs' cans tells the truth—but the consumer in many cases never sees it." *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303. Compare *Columbia Cheese Co.* v. *McNutt*, 137 F. (2d) 576 (C. C. A. 2), certiorari denied February 28, 1944, No. 614, this Term.

We believe that the language and history of the Act do not permit a judicial construction excepting the petitioners' product from its scope. If, as a result of scientific or technological advances, filled milk of the type produced by the petitioners

should no longer be excluded from the channels of foreign and interstate commerce, the remedy would seem to lie with Congress and not the courts. See *United States* v. *Carolene Products Co.*, 104 F. (2d) 969, 970 (C. C. A. 7); *Carolene Products Co.* v. *Hanrahan*, 291 Ky. 417, 426; *Sage Stores Co.* v. *Kansas ex rel. Mitchell*, 157 Kans. 404, pending on petition for certiorari, No. 745, this Term.

II

The Circuit Court of Appeals correctly held that the Act, as applied to the petitioners, did not violate their rights under the due process clause of the Fifth Amendment, and that the district court properly excluded evidence offered by the petitioners to show that their product is a wholesome, nutritive, and fairly labeled food.

In *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, this Court held that "the statutory characterization of filled milk as injurious to health and as a fraud upon the public" was no more than "a declaration of the legislative findings deemed to support and justify the action taken as a constitutional exertion of the legislative power, aiding informed judicial review, as do the reports of legislative committees, by revealing the rationale of the legislation". Consequently, the statute was held not to preclude disproof of all facts showing or tending to show that it had a

rational basis. That case arose on the appellee's demurrer to the indictment which merely challenged the validity of the statute on its face. The Court held it "evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited" (304 U. S. at 154), and therefore sustained the validity of the statute on its face.

In the present case, however, the petitioners undertook to attack the rational basis of the Act, as applied to them, by proffering specific evidence. Such an effort involves the serious burden of showing that the legislators could not in reason have enacted such a law. *South Carolina Hwy. Dept.* v. *Barnwell Bros., Inc.*, 303 U. S. 177, 190–92. We submit that the evidence tendered by the petitioners fell short of meeting such a burden and was therefore properly rejected by the district court. As has already been shown, this Act reflects a legislative solicitude for the place of milk in the American diet: Congress sought to prevent impairment of its continued production and distribution as a result of the harmful competition of a product whose characteristics were such as to falicitate fraudulent and undesirable practices in its marketing and distribution. This legislative object was legitimate, and the means by which it was sought to be attained were proper,

even though the product banned from interstate and foreign commerce in itself contained no deleterious substances and was truthfully labeled. See *McCray* v. *United States*, 195 U. S. 27, 64; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 246; *Kentucky Whip & Collar Co.* v. *Illinois Central R. R. Co.*, 299 U. S. 334, 347–49; *Hebe Co.* v. *Shaw*, 248 U. S. 297; cf. *Miller* v. *Schoene*, 276 U. S. 272; *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218; *United States* v. *Darby*, 312 U. S. 100, 112–117. The district court did not err, therefore, in excluding the evidence offered to show that Carolene was wholesome, nutritive, and fairly labeled. Such evidence alone was insufficient to establish the unconstitutionality of the Act as applied to the petitioners.

III

We submit that there is no merit in the contention (Pet. 27–31) that the evidence is insufficient to sustain the conviction of the individual petitioners Hauser and Hartke. They were, respectively, at the time of the shipments charged in the indictment, the president and vice president of the corporate petitioner Carolene Products Company, of which both were also directors (R. 65). They were also, respectively, secretary and president of the Litchfield Creamery Company (R. 62–63), which manufactured Carolene for the corporate petitioner (R. 67). The sole business

of Carolene Products Company was that of sales agent for the Litchfield Creamery Company (R. 238) in selling filled milk (R. 96). The individual petitioners used the same offices for transacting the business of both corporations (R. 87). In 1941 the Litchfield Creamery Company manufactured 1,590,000 cases of Carolene for the Carolene Products Company (R. 228); and in the same year the latter company sold 1,480,661 cases, approximately half of which were shipped in interstate commerce (R. 236–237). In their plea in abatement petitioners swore that Carolene Products Co.'s "business in interstate commerce was very substantial during the past years. Its business has been built up and developed by long and persistent effort and at great expense" (R. 12–13). Government witness Ahlmann, a food and drug inspector, testified to a conversation with petitioner Hauser in which the latter had taken the position that the company would continue to distribute its compounds without the approval of the Food and Drug Administration, since "he had changed his filled milk products in such a manner that in his opinion they were legal" (R. 107). The individual petitioners were the officials from whom an employee "received instructions to sign bills of lading for Carolene Products Company" (R. 127).

As this Court pointed out in *United States* v. *Dotterweich*, 320 U. S. 277, 281, 284, "the only way in which a corporation can act is through the

individuals who act on its behalf", and a criminal offense is committed "by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws". As much as in the case of Dotterweich, the evidence here amply shows the responsibility of the individual petitioners for the acts done in the name of the corporation.

IV

The individual petitioners contend (Pet. 31–33) that a verdict in their favor was required because they had been called as Government witnesses. This, they urge, constituted a violation of their constitutional privilege against self-incrimination. Upon being called by the Government, petitioner Hartke testified, without objection, to his name, place of residence, and position as a shareholder, director, and president of the Litchfield Creamery Company; to the fact that this was an Illinois corporation with which he had been connected since 1920; and to the fact that he had been an original incorporator and continuously associated with the Carolene Products Company (R. 61–63). This testimony was adduced for the purpose of having Hartke identify Government Exhibits 1 and 2 (R. 62–64). In the course of and at the close of this testimony petitioners' counsel volunteered stipulations to the effect that in 1941 Hartke was president and Hauser treasurer of Litchfield Creamery Com-

pany (R. 62–63), and that in 1941 Hauser was president and Hartke vice-president, and both directors, of the Carolene Products Company (R. 64–65). And at the close of Hartke's testimony the court granted, without opposition from the Government, the motion of petitioners' counsel to exclude all such testimony "insofar as any application it may have to him as an individual defendant is concerned" (R. 64). Later Hauser was called by the Government and was asked merely his name, which, on the objection of his counsel, he did not state (R. 101–102). Thereafter petitioners' counsel moved for a directed verdict in favor of the individual petitioners, on the basis of their having been called as Government witnesses (R. 102–104). In denying this motion the court pointed out that the case was being tried without a jury, and that the court was "supposed to be able" to eliminate from its mind any testimony improperly received (R. 104).

It is conceded that as applied to a defendant in a criminal case, the constitutional privilege against self-incrimination normally protects him from being called upon to testify to any facts;

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[8] 8 Wigmore, *Evidence* (3d ed. 1940), sec. 2268, pp. 392–396, and cases there cited; see particularly *State* v. *Smith*, 56 S. D. 238 (1929); *Blair* v. *Commonwealth*, 166 Va. 715 (1936); *Town Council* v. *Owens*, 61 S. C. 22 (1901); cf. *Mullaney* v. *United States*, 79 F. (2d) 566 (C. C. A. 1). Wigmore cites *United States* v. *Rota*, 9 P. I. 426 (1907), as *contra*, and for the proposition that an accused may be questioned so long as he does not object, but there the accused had pleaded guilty.

and it is expressly provided by statute (28 U. S. C. 632) that such a defendant "shall, at his own request but not otherwise, be a competent witness." The procedure in the present case is sustained, however, by the decision in *United States* v. *Austin-Bagley Corp.*, 31 F. (2d) 229 (C. C. A. 2), certiorari denied, 279 U. S. 863, apparently the only federal case in which this question has heretofore been considered. In that case the Government called the defendants Fingerhood, Joseph Beck, and Lagier to tell their official positions in the corporations defendant, and in Fingerhood's case to identify the corporate books as a condition to their admission" (31 F. (2d) at 233). In several important respects that case was a stronger one for the defendants: (1) the trial was by jury; (2) objections were interposed at the outset and overruled;[4] (3) motions to strike the testimony were overruled;[5] and (4) the substantial content of the testimony had not, as here, been stipulated. The circuit court of appeals, consisting of Judges Learned Hand, Swan, and Augustus N. Hand, held nevertheless that since production of the [corporate] books and documents could be compelled, even if they contained entries incriminating the accused," it followed that "the greater includes the less" and that "testimony auxiliary to the production [of the documents] is as unprivileged

[4] Nos. 820 and 831, October Term, 1928, R. 290, 294, 296.
[5] *Id.*, R. 293, 296–297.

as are the documents themselves" (31 F. (2d) at 233–234). The Government in its brief in opposition to the petition for certiorari took the position that "The question * * * appears to be a serious one and open to doubt," and that "If the Court regards the decision of the Circuit Court of Appeals as of doubtful validity, the question is, in our opinion, important enough to warrant the granting of the writs of certiorari."[1] This Court, however, denied the petition (279 U. S. 863). In this case the only distinguishing circumstances show that the petitioners here could in no respects have been prejudiced by the trial court's ruling.

CONCLUSION

For the foregoing reasons we respectfully submit that, while the case is important, it was correctly decided, and further review is not required.

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MARCH 1944.

[1] *Id.*, Br. in Opp. 33.

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